Petition

81-632

No. -

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In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES G. MORETTO,
DEFENDANT-PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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I

QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1341 was intended to prevent and provide sanctions for the type of transactions alleged in the instant indictment.

2. Whether the district court erred in excluding from evidence the corporate business ledger prepared by the bookkeeper of the petitioner.

3. Whether the circumstantial evidence of the use of the mails as to all but two counts of the indictment was sufficient beyond exclusion of a reasonable doubt that the United States mails were employed.

4. Whether the improper jury instruction that the prosecution witness, Peter Aver, was in a witness protection program so infected the trial that the defendant was unduly prejudiced and denied due process.

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CHARLES G. MORETTO,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals was not reported and is included in petitioner's Appendix at page 3. No opinion of the Court of Appeals denying a petition for rehearing was rendered and said order is included in petitioner's Appendix at page 12.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on June 8, 1981. A petition for rehearing was denied on July 29, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The statute under which petitioner was prosecuted was 18 U.S.C. § 1341.

> § 1341. FRAUDS AND SWINDLES
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purposes of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction

thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 778.

Statement of the Case

The facts necessary to place in their setting the questions now raised can be briefly stated:

On August 29, 1979, the Grand Jury returned a twenty-three count mail fraud indictment against Charles G. Moretto, (hereinafter referred to as defendant or petitioner). The indictment alleged twenty-three separate transactions in violation of 18 U.S.C. § 1341. The mail fraud scheme alleged was that Mr. Moretto, owner of a nightclub in Peabody, Massachusetts, had sought to defraud the Commonwealth of Massachusetts of meal tax revenues by filing fraudulent monthly meal tax returns through the mails. The twenty-three counts were comprised of 23 tax returns filed between January, 1977 and January, 1979.

During the course of the trial the district court excluded from evidence the general business ledger of petitioner's lounge, even though trial counsel produced testimony the ledger had been kept in the normal course of business and that it was kept by one who received information from one with knowledge (A. 167, 168, 181, 182, 184).[1] The trial court, in its decision to exclude the document from evidence, looked to the "relevancy" of the document (A. 300). The trial court also chose to exclude that opinion testimony of defense witness C.P.A. Paul Keating (A. 671), which was based on the ledger even though the witness had testified the ledger was "of the type and format that is consistent with one that would be prepared for" this type of business and that nothing was "missing" from the book (A. 729-730).

[1] "A." refers to the Appendix in the Court of Appeals.

In denying defendant's motion for acquittal, the trial court ruled there was sufficient evidence of the use of the mails to take the case to the jury. However, the only evidence submitted of proof of the use of the mails were two postmarked envelopes and the testimony of an F.B.I. agent that the defendant had stated to him he mailed his Massachusetts meal tax returns in (A. 126, 515).

During the course of trial a witness, Peter Aver, was called to the stand (A. 367) and in response to a question as to promises and rewards to be received from the government, the witness responded by stating that he was placed in a witness protection program (A. 392). To this, defense immediately objected (A. 392) on the grounds that such deference suggested a need to be protected from the defendant (A. 392-393). The Trial Court granted defendant's motion to strike (A. 394).

Thereafter, in his charge and instructions to the jury, the Court instructed the jury that the witness, Peter Aver, was in a witness protection program (A. 979). To this instruction, the defense objected (A. 983) and moved for mistrial which the Court denied (A. 987).

Verdicts of not guilty, as to Counts 1, 22 and 23, and guilty, as to Counts 2-21, were returned by the jury on November 2, 1979.

On January 30, 1980 the defendant was sentenced on each of the twenty counts to one year imprisonment, sentence suspended, fines totaling twenty thousand ($20,000.00) dollars, two years probation—including special conditions for performance of five hundred hours of community service—and repayment to Commonwealth of Massachusetts for interest and taxes owed.

Defendant claimed an appeal to the United States Court of Appeals on January 24, 1980 (P. App. 1). On June 8, 1981 the United States Court of Appeals for the First Circuit affirmed the judgment of the district court (P. App. 2). Defendant then filed a petition for rehearing on June 26, 1981. Said petition was denied by the Court of Appeals on July 31, 1981. (P. App. 14)

Argument

THE INDICTMENT FAILED TO SET FORTH AN OFFENSE ENCOMPASSED WITHIN 18 U.S.C. § 1341, AS THE FEDERAL MAIL FRAUD STATUTE WAS NOT INTENDED TO PREVENT THE TYPE OF TRANSACTION INVOLVED IN THE INSTANT INDICTMENT.

The federal mail fraud statute, 18 U.S.C. § 1341, was not intended to apply to state tax fraud where the requisite state tax returns were filed by mail as alleged in the indictment. It is petitioner's contention that it was error for the district court to deny defendant's motion to dismiss.

Chief Justice Burger has recently observed the mail fraud statute "has traditionally been used against fraudulent activity as a first line defense." *United States* v. *Maze*, 414 U.S. 395, 405-406, 94 S.Ct. 645, 651, 38 L. Ed. 2d 603 (1974) (Burger, C.J. dissenting). The Chief Justice observed that "when a 'new' fraud develops—as constantly happens—the mail fraud statute becomes a stop gap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil." *Id.* at 405-406. It is apparent state tax evasion is not a "new" fraud for which there is no remedy; applying the Chief Justice's standard, the mail fraud statute was not necessary as a "stop gap device" for the crimes alleged.

The case of *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974) is in direct support of defendant's argument. In that case the court found the mail fraud statute to be an appropriate basis for prosecution of federal tax fraud violations. The court specifically held "the sweep of the statute is broad, indeed, but the entire course of the statute's application has been to schemes of a different nature from the scheme alleged in this indictment. . . (the) mail fraud provision has generally been confined to schemes of a type designed to defraud members of the community at large, in the sale of commodities and services, rather than schemes to defraud the government,

as is involved in this case. The court is of the view that the statute does not include within its proscription a scheme to defraud. . . in the collection of income taxes." *Id.* at 1053.

The legislative history of Section 1341 indicates that its general purpose was primarily directed at confidence men who engaged in schemes to defraud the public. *Henderson*, *supra*, (citing H.R. Rep. No. 1501, 50th Cong., 1st Sess. 1888, S. Rep. No. 2566, 50th Cong. 2nd Sess. 1889). Indeed, it is clear from the *Henderson* case that "the thrust of the statute was to protect the public, more precisely the gullible public, against the various fraudulent schemes that the cunning trickster could devise". *Id.* at 1052-1053.

Additionally, insofar as the transactions alleged in the indictment were all purely local in nature, all taking place within the Commonwealth of Massachusetts, and the offenses were capable of state enforcement and prosecution, the application of the federal mail fraud statute to a state tax fraud charge appears patently inappropriate. The mere use of the mails should not trigger federal prosecution in every instance as "not every tangential use of the mails in essentially local fraud cases makes them into federal issues." *United States* v. *Chason*, 451 F.2d 301, 303 (2d Cir. 1971).

The Court of Appeals by holding the fact the scheme violated state tax laws did not exclude it from the proscription of the federal mail fraud statute has decided an important question which has not, but should be, decided by this Court.

A Proper Foundation Was Laid for the Inclusion of the Corporate Business Ledger into Evidence.

Rule 803 of the Federal Rules of Evidence provides for the introduction of records of regularly conducted business activity into evidence. The requirements for admissibility are the records must be kept 1.) "in the course of a regularly conducted business activity", *United States* v. *Grossman*, 614

F.2d 295, 297 (1st Cir. 1980); and 2.) "record be made by, or from information transmitted by, a person with knowledge." *Id.*

In this case the record sought to be introduced was the business ledger of the defendant's business. The prosecution on appeal contended the defense failed to establish a proper foundation for the records admissibility. Defense did satisfy the two prong requirement of Rule 803. The district court, however, improperly excluded the ledger on the stated grounds of it being irrelevant to the case. (A. 300)

Defense introduced testimony supporting the first requirement the ledger be kept in the ordinary course of a regularly conducted business activity when Mr. Elefson, the bookkeeper of defendant's business, testified:

> Q. (Mr. Vita)...you performed the services that you did according to sound accounting practices known to you; isn't that right?
> A. (Mr. Elefson) I tried to.
> Q. Isn't that correct?
> A. Yes. (A. 182)

And the other requirement, that the ledger be kept by one who receivd information from one with knowledge, was satisfied when the accountant, Mr. Elefson, further testified:

> Q. (Mr. Scott) What was the source for the numbers you entered on the meals tax returns?
> A. (Mr. Elefson) I would find in the drawer every month a paper that had the sales and sales tax on it and this is what I would use.
> A. This was the procedure that was set up originally with Mr. Charles Moretto... (A. 167)

Mr. Moretto, as the primary officer of the corporation, was undeniably "a person with knowledge" within the ambit of Rule 803.

This is a sufficient foundation—for to require more—would have, in fact, compelled the defendant to forego his constitutional right not to testify which he had exercised. The protection offered by the Fifth Amendment to the Constitution that "no person shall be compelled in any criminal case to be a witness against himself" extends to answers which might reasonably furnish a link in the chain of evidence necessary for prosecution; requiring Moretto to testify as to the source of the tally figures Elefson used in the preparation of the ledger could have opened such catenation of events. *Enrichi* v. *United States*, 212 F.2d 702 (1954). In fact, the Court informed defense counsel after repeated attempts to introduce ledger at trial that "you know how to get it in." (A.) Obviously the Court was referring to putting the defendant on the stand to explain the source of information from which the ledger was compiled. The defendant's refusal to testify on this issue was valid and justifiable. The defendant had a constitutional right not to testify on his own behalf and "his exercise of that right cannot be penalized by the exclusion of testimony otherwise admissible." *White* v. *United States*, 216 F.2d 1, 7 (1954). To condition admissibility upon a more direct proof than that supplied would have been to compel defendant to testify in violation of his Fifth Amendment rights or to penalize his exercise of his right by excluding the admissible testimony.

Although the Rule has provisions for excluding business records which fail to prove themselves *trustworthy* the district court failed to rule there was a lack of trustworthiness. In excluding the ledgers the trial court improperly addressed itself to the "relevancy" (A. 300, 311) of the records, a matter for the jury after a proper foundation had been laid. *Rosario* v. *Amalgamated Ladies Garment Cutters Union*, 605 F.2d 1228 (2nd Cir. 1979). The fact the documents may have been untrustworthy could be later asserted and relied upon by the appeals court as a proper basis for exclusion, for if a specific objection is sustained upon an untenable ground the appellate

court was not obligated to consider the availability of a different ground. (See, McCormick on Evidence, 2nd Ed., Sec. 52, p. 61, citing *Bloodgood* v. *Lynch*, 293 N.Y. 308 (1944)).

In failing to rule there was a lack of trustworthiness, the court committed error. This error is not a harmless error as the Court of Appeals ruled in light of the government's evidence which included records of bank transactions, vendors' records of liquor sales, income tax returns and various F.B.I. charts and reports. Such exclusion prevented the jury from examining the very books (i.e., the ledger) of the business where the entries were being made by the bookkeeper and with the knowledge of the defendant during a time when the alleged fraud was continuing.

This exclusion further harmed the defendant when the trial court wrongfully excluded that opinion of the certified public accountant, Paul Keating, which was based on the excluded business ledger.

"The weakness in the underpinnings of [expert's] opinions may be developed upon cross examination and such weakness goes to the weight and credibility of the testimony", *Polk* v. *Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir. 1976) and does not affect the "admissibility of the testimony itself." *Gisriel* v. *Uniroyal Inc.*, 517 F.2d 699, 702 (8th Cir. 1975). In this case it was error to exclude the opinion evidence of Paul Keating to the effect that the business ledger accurately reflected the meal tax returns where the weight and credibility of the expert are matters for the jury.

The expert's credentials were established at trial after the court stated that, as a practice the court doesn't "designate experts." (A. 671) Mr. Keating testified the general ledger was "of the type and format that is consistent with one that would be prepared for" this type of business (A. 729) and was of the type relied upon in the field. (A. 744) Mr. Keating then testified of his opinion as to whether or not the meals tax was correctly reported on the returns and that his opinion was predicated upon records such as the business ledger, tax returns and government work papers. (A. 739)

The Appeals Court also held Keating's opinion was inadmissible because it was based upon evidence which was inadmissible. (P. App. 6) Opinion evidence based upon the excluded evidence is admissible as long as the evidence is based upon a type of data "relied upon in the field." (A. 744) Federal Evidence Rule 703 provides if the facts or data relied upon by the expert are of the type reasonably relied upon by experts in the field in forming opinions, the facts *need not be admissible* in evidence. Thus, the fact the business ledger was excluded (whether wrongfully as defendant argues *supra*, or even if it was justifiable exclusion) is not a basis for excluding the opinion of Paul Keating.

The "better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession." *Jenkins* v. *United States*, 307 F.2d 637, 641 (D.C. Cir. 1962). Under Federal Rules of Evidence 701 and decisions such as *Jenkins*, *supra*, the proper action would have been cross-examination as to the weight and credibility of the expert's opinion and not the outright exclusion of the testimony. Such exclusion amounts to abuse of discretion and constitutes reversible error. It is the responsibility of this Court to realign the holding in conformity with the Federal Rules of Evidence where such exclusion was particularly harmful to the defendant.

CIRCUMSTANTIAL EVIDENCE DID NOT PROVE TO THE EXCLUSION OF A REASONABLE DOUBT THE UNITED STATES MAILS WERE IN FACT EMPLOYED.

Upon examination of the tax official, Mr. Osganian, the defense showed there was no direct evidence the mails were employed. The government could produce no envelopes (excepting two) and relied principally upon the statements of an F.B.I. agent that the mails were used. In point of fact, the evidence was that many thousands of returns were hand

delivered and that once the evelopes were opened it was impossible to tell those which were mailed from those that were hand delivered. (A. 81, 82, 83)

In *United States* v. *Joyce*, 499 F.2d 9 (7th Cir. 1974), the court held that the government had failed sufficiently to show the use of mails where no stamped envelopes were produced and the procedure for handling mailed deliveries and hand deliveries was similar, so that the jury could only speculate as to whether or not the mails had been employed. *Id.* at 18. (See also *United States* v. *Stull*, 521 F.2d 687 (6th Cir. 1975); *United States* v. *Fassoulis*, 445 F.2d 13 (2d Cir. 1971) for similar results.)

Such is the case here where the addressee's stated procedure as to the handling of hand deliveries and mailed deliveries was the same. The tax official, and ultimately the jury, could do no more than speculate as to the mode of delivery.

The Appeals Court held use of the mails may be established by circumstantial evidence. (Pet. App. 11) However, since proof of mailing is the same sine qua non of the Section 1341, the federal mail fraud statute, the circumstances proved must exclude all reasonable doubt. *United States* v. *Baker*, 50 F.2d 122 (2d Cir. 1931) "While it is often difficult to decide when the evidence is sufficient to reach the point of *exclusion of reasonable doubt*, it can be only when the presumption of innocence is overcome." *Id.* (emphasis added)

Testimony was elicited from defendant's bookkeeper, Mr. Elefson, that the mailing envelopes he had prepared were still in the drawer where he'd left them and that they were empty. Mr. Elefson also testified that when he cautioned the defendant that the meal tax returns would be late, Mr. Moretto replied that he would have a "messenger" deliver them to the tax office. (A. 190, 191) Such testimony sufficiently rebuts any presumptions to a point of exclusion of any reasonable doubt that the mails were in fact used.

In light of the testimony adduced by the defense and in the absence of any envelopes (excepting two), defendant maintains the presumption of innocence could not be overcome by use of circumstantial evidence to the exclusion of a reasonable doubt as is required and the evidence of the use of the mails was insufficient to send the case to the jury. The Appeals Court in holding otherwise is in conflict with other circuit's decisions as enunciated herein.

THE COURT'S INSTRUCTION THAT WITNESS PETER AVER WAS IN A WITNESS PROTECTION PROGRAM WAS HIGHLY PREJUDICIAL TO THE JURY AND VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS.

The basic rule in reviewing a charge is that it must be considered as a whole. "[T]he question is *not* whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp* v. *Naughten*, 444 U.S. 141, 147 (1973) (emphasis supplied) The Court's instruction that government witness, Peter Aver, was in a Witness Protection Program so infected the entire trial as to be violative of due process. As defense argued at the first mention of the Witness Protection Program, the mere words "witness protection" implies that the witness be protected from someone. (A. 392, 393) It injects into the juror's mind numerous speculations including the possible propensity of the defendant to violence; that the witness may have to fear the defendant; that the witness does have cause to fear the defendant; or, ultimately, that the defendant has already threatened the witness with violence. Any references to a Witness Protection Program thrusts violent connotations and overtones into a courtroom and defendant here was particularly harmed where the offenses for which he was indicted were non-violent crimes. It would be impossible for any defendant to demonstrate specific and articulate prejudice in the

record for the prejudice created was that in the mind of the jurors. The fact the government failed to comment in closing argument or have re-direct on the subject of the witness' placement in the Witness Protection Program does not obviate the unwarranted prejudice where jurors could be presumed to speculate as to the relationships between the witness, the defendant, and the witness protection program. Such extreme and undue prejudice clearly prevented the jury from being the impartial factfinders as is required of them.

Further the court was acutely aware of defense's objection to the improper designation where the defense had previously objected to the statement. (A. 393) By instructing the jury the witness was "in a place unknown under a so-called protection program" (A. 979) after defense had already successfully objected to the disclosing, the court unfairly exploited and intensified the possibility of undue influence. The second mention of the Witness Protection Program by the court (A. 979) and the third mention of it in the court's "curative" instruction (A. 989) distinguishes this case from the case of *United States* v. *Crampaglia*, 628 F.2d 632 (1st Cir. 1980), *cert. denied*, __ U.S. __ (Nov. 3, 1980) where the prosecution's single mention of the Witness Protection Program was brief and isolated.

The obvious prejudice that could inure by the improper charge so infected the jury's impartiality and thus the entire trial a curative instruction was not sufficient to protect defendant's due process rights and the court committed reversible error.

The Appeals Court's decision that such an instruction, considered as a whole, did not violate defendant's due process was wrong and not in accordance with decisions of this Court.

Conclusion

This petition for a writ of certiorari should be allowed.

Respectfully submitted,

CHARLES G. MORETTO,
By his attorneys,

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September 21, 1981.

APPENDIX

United States Court of Appeals
For the First Circuit

Criminal No. 79-336-N

UNITED STATES OF AMERICA

v.

CHARLES G. MORETTO

NOTICE OF APPEAL

Notice is hereby given that Charles G. Moretto, the defendant above-named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on or about January 19, 1980.

CHARLES G. MORETTO,
By his attorney,

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United States Court of Appeals
For the First Circuit

No. 80-1096.

UNITED STATES OF AMERICA,
APPELLEE,

v.

CHARLES G. MORETTO,
DEFENDANT, APPELLANT.

JUDGMENT
ENTERED JUNE 8, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP, *Clerk*.

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 80-1096

UNITED STATES OF AMERICA,
APPELLEE,

v.

CHARLES G. MORETTO,
DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]

Before
CAMPBELL and BOWNES, *Circuit Judges*,
and HOFFMAN,* *District Judge*.

Richard J. Vita for appellant.
Amos Hugh Scott, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

June 8, 1981

BOWNES, *Circuit Judge*. Defendant-appellant, Charles G. Moretto, appeals his jury conviction on twenty counts of mail fraud: There are five issues:

1. Whether the filing by mail of false Massachusetts monthly meals tax returns violates the federal mail fraud statute, 18 U.S.C. § 1341;

* Of the Eastern District of Virginia, sitting by designation.

2. Whether the district court committed reversible error by excluding from evidence a ledger used by defendant in his business;

3. Whether the district court committed reversible error by excluding part of the testimony of defendant's accountant-witness;

4. Whether the Government proved that defendant had used the mails to file state tax returns;

5. Whether the district court committed reversible error in its charge by stating that a Government witness was in a "protection program."

We find no reason for disturbing the verdict and affirm defendant's conviction.

Defendant, through a wholly owned corporation, CGM Enterprises, Inc., owned and operated the Checkmate Lounge in Peabody, Massachusetts, at which beer, wine, hard liquor, and at times, sandwiches were sold. He was indicted on August 29, 1979, for using the mails to defraud the Commonwealth of Massachusetts by filing fraudulent monthly meals tax returns. The indictment consisted of twenty-three counts specifying monthly mailings of false tax returns between January, 1977, and January, 1979.

The Massachusetts "meals tax" is a tax on all sales of food and alcoholic beverages sold by restaurants, bars and other establishments in the Commonwealth. The amount of the tax is based on a percentage of the retail price of the meal and/or beverage sold. The operator of the restaurant or bar is responsible for collecting the amount of the tax from the customer at the time of sale and remitting to the state on a monthly basis the taxes collected during the preceding month along with a monthly meals and alcoholic beverages tax return, Form MA B-4.

We discuss the issues seriatim.

1. *The Scope of 18 U.S.C. § 1341*

18 U.S.C. § 1341[1] has two elements: (1) using the mails in furtherance of (2) "any scheme or artifice to defraud." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). Defendant's sole argument on this issue is that the federal mail fraud statute was not intended to and does not encompass state tax frauds. Although we do wonder why the United States Attorney has become a state prosecutor, the scope of the statute and the case law leaves little doubt that the indictment properly states a federal crime. The words "any scheme or artifice to defraud" have been given a broad sweep. In *Badders* v. *United States*, 240 U.S. 391, 392 (1916), Mr. Justice Holmes stated:

> The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte Jackson*, 96 U.S. 727. Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.

And the Court has specifically noted: "The fact that a scheme may violate state laws does not exclude it from the proscription of the federal mail fraud statute, ..." *Parr* v. *United States*, 363 U.S. 370, 389 (1960).

In a case directly on point, the Eighth Circuit held that section 1341 applied to a scheme to defraud the state of Missouri

[1] Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

by sending false sales/use tax returns through the mail. *United States* v. *Mirabile*, 503 F.2d 1065 (8th Cir.), *cert. denied*, 420 U.S. 973 (1974). In a case involving false retailers' occupation tax returns, the Seventh Circuit noted, "[j]ust because the State of Illinois was the victim and makes such a scheme illegal does not preclude the Federal Government from prosecuting the perpetrators under an applicable federal law." *United States* v. *Flaxman*, 495 F.2d 344, 349 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974).

Defendant has cited no cases and we have found none holding or even suggesting that the use of the mails to defraud a state of taxes does not come within the ambit of 18 U.S.C. § 1341.

2. *The Exclusion of the Ledger*

Defendant used a part-time bookkeeper, Harvey Elefson, whose pay was three free drinks a night at the lounge. Elefson testified as follows. He prepared the general ledger and the monthly meals tax returns and entered the same sales amount on the tax returns as he did in the ledger. The source for the total amount of sales was a slip of paper left for him once a month in a desk drawer in the office. Elefson was not given daily sales sheets or cash register tapes. He never did an audit; the only source for his monthly sales figures was the slips of paper in the desk drawer of the office.

After a lengthy discussion with counsel, the trial court excluded the ledger because the accuracy and reliability of its entries had not been established. The standard of review of the district court's ruling is abuse of discretion. *United States* v. *Patterson*, No. 80-1213, slip op. at 18 (1st Cir. March 9, 1981).

Defendant contends that the ledger was properly admissible under Federal Rule of Evidence 803(6)[2] and its accuracy and

[2] (6) *Records of regularly conducted activity.* A memorandum, report, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to

reliability were for the jury. The rule allows, as a hearsay exception, the introduction into evidence of the record of a regularly conducted business activity if it is "made at or near the time" of the events and recorded "by or from information transmitted by a person with knowledge" of the activity. If these requirements are met, then the record may be admitted "unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness."

We think the source of the information indicates a lack of trustworthiness. The correct total amount of monthly sales was basic to the accuracy of the state tax returns. The source for this was not daily cash register tapes or daily sales sheets, but figures supplied by the defendant. There was no testimony as to the derivation of the figures on the cash drawer slips. The district court did not abuse its discretion in excluding the ledger.

3. *The Exclusion of Testimony*

Defendant retained Paul F. Keating, a certified public accountant, about six weeks prior to trial to testify as an expert witness. Before Keating was allowed to testify before the jury, he was subjected to an intensive voir dire by the Assistant United States Attorney. It was brought out that Keating had assumed the accuracy of the entries in the ledger and these formed the basis for his opinion that the monthly tax returns were not understated. The court reiterated that it was not going to allow the ledger in evidence and ruled that opinion testimony based on it would be excluded. The court also ruled that Keating could give his opinion as to the correctness of the tax returns if he could do so without relying on the ledger. Keating testified before the jury that, based on his examina-

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make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for a profit.

tion of the Government's work papers, the bank records, the state tax returns, and the corporate income tax returns, all of which were in evidence, the defendant overpaid his state meals tax. Keating testified in detail as to the reasons for his opinion and sharply criticized the method the Government's expert witness used in arriving at the opposite conclusion.

The district court did not err in excluding testimony based upon the ledger.

4. *Proof of Use of the Mails*

Where the issue is one of the sufficiency of proof, our review of the evidence and the logical inferences to be drawn therefrom must be made in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Davis*, 623 F.2d 188, 195 (1st Cir. 1980); *United States* v. *Zurosky*, 614 F.2d 779, 794 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980).

The Government's evidence can be summarized as follows. Two F.B.I. agents testified that defendant stated that he filed the state returns by mail; one of the agents quoted the defendant as saying that he "always mailed his state returns in." The chief of the State Tax Audit Bureau and the head of the State Bureau of Analysis and Processing State Tax Returns testified that the usual method of filing meals tax returns was by mail. The head of the Bureau of Analysis and Processing testified that a self-addressed envelope was sent to each taxpayer along with the blank tax return form. Two stamped and postmarked envelopes received by the state tax department containing defendant's tax returns and checks for November and December of 1978 were made exhibits. These two months were outside the time frame of the indictment, but the envelopes were properly received in the light of defendant's reported statements that he used the mails for filing his tax returns. The part-time bookkeeper testified that in "many months" he would make out an envelope for the tax return and the check and when there were stamps in the drawer, which

was only occasionally, he would put one on the envelope. Finally, the head of the State's Bureau of Analysis and Processing testified that processing notations on defendant's tax returns for January and February, 1977, showed that these two returns were filed late and received through the mail. These two returns did come within the time frame of the indictment, from January, 1977, to January, 1979.

It has long been the rule that direct proof of mailing is not necessary and that the use of the mails may be established by circumstantial evidence. *United States* v. *Cady*, 567 F.2d 771, 775 (8th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971); *Stevens* v. *United States*, 306 F.2d 834, 835-36 (5th Cir. 1962); *United States* v. *Leathers*, 135 F.2d 507, 510 (2d Cir. 1943).

We think the statements of the defendant plus the other circumstantial evidence were sufficient for a jury to find beyond a reasonable doubt that the defendant had used the mails for filing his monthly tax returns.

5. *The Reference in the Charge to a Witness Being in a Protection Program*

The chief witness for the Government was Peter Auer (a/k/a Aver). The main thrust of his testimony was that the defendant, whom he had known for many years, had told him of his scheme to defraud the Commonwealth by filing false tax returns. At the time of the conversation, Auer was one of the proprietors of the Coach and Six Restaurant in Peabody. At the defendant's suggestion, Auer contacted the same state tax official who was "approving" defendant's monthly returns and began to file understated tax returns for the Coach and Six.

Auer had an extensive criminal record with at least seven larceny convictions. He also testified as to being involved in fraudulent bank loan schemes, small business fraud, arson insurance fraud and receiving stolen goods. In response to a question by the prosecutor as to what he understood the

Government had promised him, Auer answered: "For any truthful testimony that I give that I would not be prosecuted for any crimes that I had been involved in if I was willing to give truthful testimony and also be put in the Federal Witness Protection Program." After objection by defense counsel, there was a lengthy bench conference at the conclusion of which the court told the jury:

> The motion to strike reference to a so-called witness protection program is allowed. The jury will disregard that statement. Let it be known that the witness protection program has nothing to do with the defendant or the issues in this particular case and therefore you just disregard it as being harmless in this matter.

In its charge to the jury, the court pointed out that Auer was a Government witness and explained the immunity promise given him. The judge also stated, "And you know that, of course, he's being kept in a place unknown under a so-called protection program." He further instructed the jury that Auer's testimony "must be carefully scrutinized and weighed with great care and received with caution." After the charge, defense counsel objected to the reference to the protection program and moved for a mistrial. The court denied the motion for a mistrial, but in its subsequent charge instructed the jury as follows:

> Now I did make reference in my discussion with you about the defendant (sic) was in a place unknown or being kept aside, or something of that kind. The idea is, and I don't recall now, and I'm made to understand that there was no reference to it during the course of the trial. Whatever is the case, it has nothing to do with this case or nothing to do with the defendant. Whatever the situation of the particular witness is it had nothing to do with the defendant nor has the defendant caused it or brought it about or is responsible for it. So you just disregard that entirely.

After the seond charge, counsel was given the opportunity to state objections, but made none.

We see little merit in defendant's contention that reference to Auer being in a protection program was so prejudicial as to require a new trial. The basic principle in reviewing a charge is that it must be read and considered as a whole. "[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." *Cupp* v. *Naughten*, 444 U.S. 141, 147 (1973). In this case, the Court did isolate and cure the ailing instruction. Moreover, this was not the type of instruction that had the potential for infecting the entire charge. As we pointed out in *United States* v. *Ciampaglia*, 628 F.2d 632, 640 (1st Cir.), *cert. denied*, __ U.S. __ (Nov. 3, 1980), the possibility that such a disclosure might cause undue prejudice to the defendant is minimal unless it is exploited by the prosecution, which was not done here. The court's charge was clear, thorough and scrupulously fair. This one minor mistake did not even approach a due process violation.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 80-1096.

UNITED STATES OF AMERICA,
APPELLEE,

v.

CHARLES G. MORETTO,
DEFENDANT, APPELLANT.

Before CAMPBELL and BOWNES, *Circuit Judges*
and HOFFMAN, *District Judge.**

ORDER OF COURT
Entered July 22, 1981

It is ordered that the petition for rehearing herein filed on June 29, 1981, be, and the same hereby is, denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

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* Of the Eastern District of Virginia, sitting by designation.

United States Court of Appeals
For the First Circuit

No. 80-1026.

UNITED STATES OF AMERICA,
APPELLEE,

v.

CHARLES G. MORETTO,
DEFENDANT, APPELLANT.

NO. BELOW: 79-0336-01
JUDGE BELOW: J. NELSON
DATE OF JUDGMENT: JANUARY 19, 1980
NOTICE OF APPEAL FILED: JANUARY 24, 1980
[MAIL FRAUD]

GENERAL DOCKET

Date	*Filings—Proceedings*
1980	
Feb. 7	Record on appeal in one volume received and filed and case docketed. Notices mailed, (cb)
Feb. 14	Appearance of Richard Vita, Esquire for Appellant received and filed. (cb)
Feb. 20	Statement pursuant to Local Rule 8(a) received and filed. (cb)
Feb. 29	Motion filed. Order (Campbell, J.) enlarging time for appellant to file his statement of issues and designation to and including April 14, 1980. Further ordered that the time for filing brief and appendix be enlarged to and including May 16, 1980. Notices mailed. (mn)
May 19	Order (Coffin, Ch. J.) enlarging time for filing the transcript to June 9, 1980; enlarging time for filing the statement of issues and designation to June 19,

Date		*Filings—Proceedings*
1980		
		1980; and further enlarging time for filing the brief for appellant and the appendix to and including July 14, 1980. Notices mailed. (lam)
July	14	Supplemental certificate consisting of 8 volumes of transcript, received and filed. (mn)
July	18	Motion and affidavit in support, filed. Order (Coffin, Ch. J.) enlarging time for appellant to file his statement of issues and designation to July 23, 1980 and further enlarging time for appellant to file his brief and appendix to August 11, 1980. Notices mailed. (eam)
July	24	Motion filed. Order (Coffin, Ch. J.) enlarging time for filing statement and designation to August 6, 1980; enlarging time for filing brief for appellant and appendix to August 21, 1980. Notices mailed. (jmv)
Aug.	5	Statement of issues and designation received and filed. [eam]
Aug.	8	Appellees designation of appendix received and filed. [eam]
Aug.	19	Motion filed. Order (Bownes, J.) enlarging time for filing brief for appellant and appendix to September 18, 1980. Notices mailed. (jmv)
Sept.	16	Motion filed. Order (Campbell, J.) enlarging time for filing brief for appellant and appendix to Sept. 22, 1980. Notices mailed. (jmv)
Sept.	22	Brief and appendix in two volumes, received and filed. Notices mailed. (eam)
Oct.	7	Motion filed. Order (Bownes, J.) enlarging time for filing brief for appellee to October 21, 1980. Notices mailed. (jmv)
Oct.	17	Brief for appellee received and filed. [jc]
Oct.	21	Supplemental certificate consisting of certain documents received and filed. (eam)

Date 1980	*Filings—Proceedings*
Nov. 6	Appearance of Amos Hugh Scott, Esquire, for appellee received and filed. (cb) Heard by Campbell, Bownes & Hoffman, J.J. [lam]
June 8	JUDGMENT: The judgment of the district court is affirmed. Notices mailed. Unpublished opinion of the court by Bownes, J. (jmv)
June 16	Motion filed. Order (Campbell, J.) enlarging time for filing Petition for Rehearing and/or Rehearing en banc to June 29, 1981. Notices mailed. [eam]
June 29	Petition for rehearing, received & filed. (mn)
July 22	ORDER: (Campbell & Bownes, JJ & Hoffman, D.J.) The petition for rehearing is hereby denied. Notices mailed. [eam]
July 29	Mandate issued, copy filed and original papers returned to the district court. Notices mailed. (cb)

A True Copy:
Attest:
/s/ DANA H. GALLUP,
Clerk.